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No. 90-1260

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In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD CANNISTRARO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's prosecution for racketeering offenses violates the Double Jeopardy Clause because some of the predicate acts of racketeering involve criminal conduct for which petitioner was previously convicted.

2. Whether petitioner's prosecution for conspiracy to commit securities fraud violates the Double Jeopardy Clause because petitioner was previously convicted of a different securities fraud conspiracy.

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OPINION BELOW

The order of the court of appeals affirming petitioner's conviction (Pet. App. 1b) is unreported, but the judgment is noted at 919 F.2d 137 (Table). The opinion of the district court (Pet. App. 1a-26a) is reported at 734 F. Supp. 1110.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1990. The petition for a writ of certiorari was filed on February 6, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

On September 29, 1989, a grand jury in the District of New Jersey returned an indictment against petitioner charging him with participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count 1); conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 2); and conspiring to commit securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff, and 17 C.F.R. 240.10b-5 (Count 3). The district court denied petitioner's motion to dismiss the indictment on double jeopardy grounds, and the court of appeals summarily affirmed. Pet. App. 1b.

1. In May 1987, an indictment was returned in the District of New Jersey charging petitioner with one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371; four counts of creating and using false nominee accounts in connection with the purchase and sale of securities, and one count of preparing and distributing a false and misleading stock research report, in violation of 15 U.S.C. 78j (b); one count of interstate transportation of money obtained by fraud, in violation of 18 U.S.C. 2313; one count of mail fraud, in violation of 18 U.S.C. 1341; and one count of obstructing a grand jury investigation, in violation of 18 U.S.C. 1503. The obstruction charge covered events occurring between January 1986 and February 1987; the other charges involved conduct occurring between December 1982 and October 1984. The fraud and conspiracy charges related to petitioner's schemes concerning the stock of two companies: Liquidation Control, Inc. (LCI) and Toxic Waste Containment, Inc. In September 1987, petitioner pleaded guilty to all the charges

against him and was sentenced on those charges. Pet. App. 4a.

2. a. In September 1989, a separate indictment was returned against petitioner and two others. In substantive and conspiracy counts under the federal racketeering statute (RICO) the indictment charged that, from January 1982 to January 1989, petitioner and others conducted the affairs of a securities brokerage firm through a pattern of racketeering activity involving a variety of fraudulent securities trading practices. 1989 Indictment, Count 1 ¶ 6; Count 2 ¶ 52. According to the indictment, petitioner set up false nominee accounts at Monarch Funding, Inc., a securities brokerage firm, in the name of his father, his aunt, and two other people for the purpose of engaging in securities trading for his own benefit while concealing the fact that he was doing so. Count 1 ¶ 8.a. He also prepared and distributed false and misleading research reports for Wood Gundy, Inc., where he was a securities analyst, recommending purchase of the stock of LCI, Toxic Waste, Astrosystems, Inc., Nature's Bounty, Inc., High Technology Capitol Corp., and Solar Age Manufacturing Corp., in order to inflate the prices of those stocks after he had previously purchased them for his nominee accounts. Count 1 ¶ 6.b.

In addition, petitioner and his co-conspirators bribed the managers of two funds and a research analyst to cause the funds and a person advised by the analyst to purchase large amounts of the stock of LCI, Toxic Waste, and High Technology. Count 1 ¶ 8.c. Petitioner also failed to disclose to the SEC and the investing public his involvement in forming, controlling, and investing in High Technology, so that he could raise capital for, manage, and trade in the

stock of the company, all in an undisclosed manner. Count 1 ¶ 8.d. Finally, petitioner bribed one of his nominees to conceal from the grand jury petitioner's beneficial ownership of the nominee's brokerage account at Monarch. Count 1 ¶ 8.e.

In a separate count charging conspiracy to commit securities fraud, the indictment alleged that petitioner agreed with the president of Solar Age that, in exchange for the transfer of a large amount of Solar Age stock to High Tech, the president would disseminate false research reports concerning Solar Age and obtain additional financing for the company. Prior to the dissemination of the reports, petitioner and his co-conspirators arranged to purchase Solar Age securities; after the reports were released and the stock price had risen, the securities were sold to the investing public without disclosure of the fraudulent scheme. Count 3 ¶¶ 3-7.

b. Petitioner moved to dismiss the indictment, contending that Counts 1 and 2, the RICO counts, were barred under a "strict" double jeopardy analysis, while Count 3, the securities fraud charge, was barred by double jeopardy "considerations" and collateral estoppel. Pet. App. 6a. The court rejected those arguments. It noted that the government had admitted, for purposes of the motion, that among the predicate acts of racketeering were acts of obstruction of justice and fraud involving LCI and Toxic Waste that "deal with the same criminal conduct for which [petitioner] was charged and convicted" in the first indictment. *Id.* at 14a. But, the court held, the RICO charges in the second indictment, which encompassed a far more complex criminal scheme than was at issue in the first indictment, and which involved numerous companies and activities not previ-

ously charged, *id.* at 5a, were not barred because of the prior prosecution involving a few of the predicate acts. The court relied for that holding chiefly on the Third Circuit's decisions in *United States* v. *Esposito*, 912 F.2d 60 (1990), and *United States* v. *Pungitore*, 910 F. 2d 1084 (1990), petition for cert. pending, No. 90-6524, which had upheld successive prosecutions for RICO violations and the underlying predicate acts against a double jeopardy attack.

The court rejected petitioner's claim that *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), requires a different result. In *Grady*, the Court held that in a case involving a single criminal act giving rise to two statutory violations, a second prosecution is barred "if, to establish an essential element of an offense * * *, [the government] will prove conduct that constitutes an offense for which the defendant already has been prosecuted." 110 S. Ct. at 2093. In *Esposito* and *Pungitore*, the Third Circuit concluded that under *Garrett* v. *United States*, 471 U.S. 773 (1985), successive prosecutions for a RICO offense and its predicate acts of racketeering were permissible, and that *Grady* had not modified this principle. Applying those circuit precedents, the district court concluded that the RICO charges against petitioner were not constitutionally barred. Pet. App. 13a-26a.[1]

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[1] Alternatively, the government argued that the instant prosecution is not barred because it charges a conspiracy that continued after the time period covered by the first indictment, and even continued after petitioner had entered his plea in that case. Because the court agreed with the government's contention that the second indictment was valid even apart from this factor, it declined the government's offer of proof to establish the time period of the conspiracy. Pet. App. 17a.

The court also rejected petitioner's claim that the conspiracy count relating to Solar Age was barred by the Double Jeopardy Clause. Petitioner did not argue that he had previously been prosecuted for the Solar Age conspiracy (or for misconduct relating to it); rather, he asserted that because the misconduct alleged in that count was mentioned in the presentence report in the first case, the charges in the second indictment exposed him to "unconstitutional double punishment." Pet. App. 6a n.3, 25a-26a n.12. In dismissing that contention, the court stated that "counsel has not presented any case law demonstrating Double Jeopardy concerns are even implicated in pre-sentence reports. If that were the case the inclusion in such reports of prior convictions, arrests and the like would be impossible." *Id.* at 25a n.12.[2]

3. Petitioner took an interlocutory appeal under *Abney* v. *United States*, 431 U.S. 651 (1977), from the denial of his motion to dismiss. Relying on *Esposito* and *Pungitore*, the government moved for summary affirmance of the district court's order. The court of appeals granted the government's motion and summarily affirmed. Pet. App. 1b.

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[2] The court also stated that, as a factual matter, the Solar Age information did not affect the prior sentence. Pet. App. 25a n.12.

ARGUMENT

1. Petitioner contends (Pet. 6-14) that the RICO charges against him are barred by the Double Jeopardy Clause because they include as predicate acts conduct for which he was previously convicted. The courts below correctly rejected that claim.

a. In *Garrett* v. *United States*, 471 U.S. 773 (1985), the Court held that the use of a drug importation offense, for which the defendant had previously been convicted, as a predicate offense in a "continuing criminal enterprise" (CCE) prosecution did not violate the Double Jeopardy Clause. After determining that Congress intended to allow separate prosecutions for CCE and its predicate offenses, *id.* at 779-786, the Court in *Garrett* went on to determine whether such separate prosecutions, even though authorized by Congress, would nevertheless be unconstitutional. *Id.* at 786. The Court said: "The critical inquiry is whether a CCE offense is considered the 'same offense' as one or more of its predicate offenses within the meaning of the Double Jeopardy Clause." *Ibid.*

The Court expressed "serious doubts" that the predicate drug violations are lesser included offenses within CCE, 471 U.S. at 790, cautioning against the "ready transposition of the 'lesser included offense' principles of double jeopardy from the classically simple situation [of a single course of conduct] to the multilayered conduct, both as to time and place, involved in this case," *id.* at 789. Rather, the Court stated that "[q]uite obviously the CCE offense is not, in any common-sense or literal meaning of the term, the 'same' offense as one of the predicate offenses."

Id. at 786.[3] Nevertheless, assuming for purposes of decision that CCE is the same offense as its predicate offenses, the Court concluded that the Double Jeopardy Clause was not violated because the CCE offense charged in that case continued after the date of the indictment for the predicate offense. *Id.* at 791-793.

In light of *Garrett*, the courts of appeals have uniformly held that the Double Jeopardy Clause does not bar the use of an offense for which the defendant has already been prosecuted as a predicate act of racketeering in a RICO case. *E.g.*, *United States* v. *Gonzalez*, 921 F.2d 1530, 1535-1539 (11th Cir. 1991); *United States* v. *Gambino*, 920 F.2d 1108, 1112-1113 (2d Cir. 1990); *United States* v. *Grayson*, 795 F.2d 278, 282-283 (3d Cir. 1986), cert. denied, 479 U.S. 1054 (1987); *United States* v. *Schell*, 775 F.2d 559, 568 (4th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); *United States* v. *Persico*, 774 F.2d 30, 32 (2d Cir. 1985); *United States* v. *Watchmaker*, 761 F.2d 1459, 1466-1468 (11th Cir. 1985); *United States* v. *Licavoli*, 725 F.2d 1040, 1049-1050 (6th Cir.), cert. denied, 467 U.S. 1252 (1984); *United States* v. *Brooklier*, 637 F.2d 620, 621-624 (9th Cir. 1982), cert. denied, 459 U.S. 1206 (1983).

b. Under the analysis in *Garrett*, petitioner's successive prosecutions did not violate the Double Jeopardy Clause. First, just as Congress intended to permit successive prosecutions for CCE and its predicate drug offenses, so it intended to permit successive

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[3] The Court explained that "[t]he CCE offense requires the jury to find that the defendant committed a predicate offense, and in addition that the predicate offense was part of a continuing series of predicate offenses undertaken by the defendant in concert with five or more other persons, that the defendant occupied the position of an organizer or manager, and that the defendant obtained substantial income or resources from the continuing series of violations." 471 U.S. at 786.

prosecutions for RICO and its predicate acts of racketeering. Under RICO, the last alleged predicate act of racketeering must occur within ten years after the commission of the prior predicate act "excluding any period of imprisonment." 18 U.S.C. 1961(5). This language suggests that Congress envisioned the situation where a defendant is convicted and sentenced for a racketeering act and subsequently charged with a RICO violation based in part on the act that led to the prior conviction. See *United States* v. *Grayson*, 795 F.2d at 282. Further, in enacting RICO, Congress declared in its Statement of Findings and Purpose that it intended to establish "new penal prohibitions" and "enhanced sanctions." Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923. Barring the use in RICO prosecutions of predicate offenses for which the defendant has previously been convicted "would nullify the intent and effect of the RICO prohibitions." *United States* v. *Rone*, 598 F.2d 564, 571 (9th Cir. 1979), cert. denied, 445 U.S. 946 (1980).

In addition, like the CCE offense considered in *Garrett*, a RICO offense is very different in nature from the offense that the statute authorizes to be charged as predicate crimes; for that reason, *RICO* is not the "same offense" as any of its predicate acts for double jeopardy purposes. Like a CCE charge, a RICO charge requires proof of multiple criminal acts occurring over an extended period of time and an ongoing criminal association often involving a large group of individuals. RICO expresses these requirements through its prohibition of a person's conducting an "enterprise" through a "pattern of racketeering activity"; the pattern in question requires proof of at least two related predicate crimes that amount

to, or pose a threat of, continuing criminal conduct. 18 U.S.C. 1962(c); see *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989). Because of the complex nature and scale of activity targeted by RICO, the criminal threat posed by a RICO violation is not equivalent in any meaningful sense to the discrete underlying predicate crimes.

Quite apart from the difference for double jeopardy purposes between RICO and its predicate crimes, petitioner's successive federal prosecutions were permissible under *Garrett* because, according to the indictment, the RICO offenses continued to at least January 1989—past the date of petitioner's initial indictment in May 1987. Although the RICO counts do not specify any act personally committed by petitioner after the return of the earlier indictment, they do allege that one of petitioner's co-conspirators committed such acts, including an attempt to obstruct justice in connection with petitioner's 1987 trial. Count 1 ¶¶ 81-86. Under *Garrett*, the government was not required to prosecute in May 1987 a RICO conspiracy that was continuing on that date. 471 U.S. at 791-793.[4]

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[4] The district court did not reach this ground for decision because it found the second indictment permissible without regard to the longer duration of the RICO violations charged in the second case. Pet. App. 17a. But the allegation in a RICO indictment of acts occurring after the date of a prior indictment for a predicate act "suffices to call for trial without any preliminary demonstration of supporting evidence," *United States* v. *Persico*, 774 F.2d 30, 33 (2d Cir. 1985), and petitioner does not claim otherwise. If the evidence at trial fails to support the allegation that the RICO offenses continued beyond the date of the first indictment, petitioner is not foreclosed from reasserting his double jeopardy claim based on that consideration.

c. Petitioner's reliance (Pet. 7-8) on *Grady* v. *Corbin*, 110 S. Ct. 2084 (1990), is unavailing. In that case, the defendant was indicted on homicide and assault charges stemming from an automobile collision. Previously, he had pleaded guilty to two misdemeanor traffic violations arising from the same incident—driving while intoxicated and failing to keep to the right of the median. Following the indictment, the prosecution filed a bill of particulars that identified three reckless or negligent acts on which it would rely in proving its case: operating a motor vehicle while intoxicated, failing to keep to the right of the median, and driving too fast for the weather and road conditions.

This Court held that the Double Jeopardy Clause barred the homicide and assault prosecution to the extent that the prosecution, to establish the essential elements of the crimes, would seek to prove conduct for which the defendant already had been prosecuted. 110 S. Ct. at 2093. The Court so held despite acknowledging, *id.* at 2092-2093, that the misdemeanor traffic offenses were not the same offense as homicide or assault under the test adopted by this Court in *Blockburger* v. *United States*, 284 U.S. 299 (1932). The Court decided that, in cases involving multiple prosecutions, the Double Jeopardy Clause requires more than "a technical comparison of the elements of the two offenses as required by *Blockburger*." 110 S. Ct. at 2093. Rather, under *Grady*, even if the offense charged in the second prosecution survives the *Blockburger* test, the prosecution will be barred if the prosecutor intends to prove, as an element of the second offense, the same conduct that formed the basis of the conviction for the first offense. *Ibid.*

Grady has no applicability here. That case involved a single incident of criminal conduct rather

than what the Third Circuit has aptly termed a "compound-complex crime[]" such as RICO, *United States* v. *Pungitore*, 910 F.2d at 1111, which generally spans a considerable time period and embraces multiple criminal activities. As the Court stated in *Garrett*, such a compound-complex offense does not, for double jeopardy purposes, "lend itself to the simple analogy of a single course of conduct." 471 U.S. at 788. And even in the context of simple offenses, the Court in *Grady* recognized that an exception to its rule against successive prosecutions for the same conduct may exist where, as here, the more serious crime is still ongoing at the time of the indictment for the less serious one. 110 S. Ct. at 2090 n.7.

Indeed, the Court in *Grady* did not in any way repudiate or limit *Garrett's* holding permitting successive prosecutions for predicate drug offenses and CCE. To the contrary, the Court cited *Garrett* with approval. 110 S. Ct. at 2090-2091, 2094 n.15. In short, *Garrett*, and not *Grady*, governs the constitutionality of multiple prosecutions for RICO and its predicate offenses. Every court of appeals that has addressed the issue has so held. *Gonzalez*, 921 F.2d at 1535-1539; *United States* v. *Link*, 921 F.2d 1523 (11th Cir. 1991); *Gambino*, 920 F.2d at 1112-1113; *United States* v. *Scarpa*, 913 F.2d 993, 1013-1014 n.8 (2d Cir. 1990).[5]

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[5] Petitioner's cause is not helped by *United States* v. *Gambino, supra*; *United States* v. *Calderone*, 917 F.2d 717 (2d Cir. 1990), petition for cert. pending, No. 90-1527; or *United States* v. *Russo*, 906 F.2d 77 (2d Cir. 1990) (per curiam). In *Gambino* and *Calderone*, the Second Circuit held that the *Grady* "same conduct" test applies to successive non-RICO conspiracy prosecutions. 920 F.2d at 1111-1112; 917 F.2d at 720-722. In *Russo*, the same court accepted the government's concession that, on the facts of that case, *Grady* barred a

2. Petitioner also contends (Pet. 14-15) that the Double Jeopardy Clause barred his prosecution for conspiring to commit securities fraud in the trading of Solar Age securities because, according to him, that charge embraced the same conspiracy that was involved in his 1987 conviction for conspiring to commit securities fraud. Petitioner further argues (Pet. 15) that the current prosecution for his activities relating to Solar Age is barred because the government made those activities known to the sentencing judge in the earlier case. Those fact-bound contentions do not warrant this Court's attention.

In determining whether two conspiracies are the same for double jeopardy purposes, courts have traditionally considered the totality of the circumstances, including such factors as the location and time periods of the conspiracies, their participants, their objectives, the alleged overt acts, and the degree of the interdependence between the conspiracies. See, *e.g.*, *United States* v. *MacDougall*, 790 F.2d 1135,

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prosecution for conduct that was charged as predicate acts in a previous RICO prosecution. However, in *Gambino*, 920 F.2d at 1112-1113, and in *United States* v. *Scarpa*, 913 F.2d at 1013-1014, the Second Circuit held that *Grady* does not ordinarily foreclose the use of previously prosecuted offenses as predicate acts in a RICO indictment.

Nor do we believe that this case should be held in light of the government's petition in *Calderone* and the government's petition to be filed in *United States* v. *Felix*, No. 89-7058 (10th Cir. Feb. 28, 1991). (We have provided a copy of our petition in *Calderone* to petitioner.) Neither of those cases involved successive prosecutions for RICO violations and the underlying predicate acts. Moreover, in this case, the charged conspiratorial conduct continued past the date of the first indictment; this establishes, under *Garrett*, that double jeopardy does not bar the second prosecution. See *Grady*, 110 S. Ct. at 2090 n.7.

1144 (4th Cir. 1986); *United States* v. *Thomas*, 759 F.2d 659, 661-662 (8th Cir. 1985). Applying those considerations, the two schemes at issue in this case constituted separate conspiracies.[6]

Here, the first-prosecuted conspiracy was one to profit from the fraudulent manipulation of the shares of LCI and Toxic Waste, principally by bribing the managers of two investment funds to purchase substantial amounts of those securities and by disseminating false research reports. The second conspiracy, on the other hand, was one to profit from the fraudulent manipulation of the stock of Solar Age. The indictment alleges that petitioner and his co-conspirators agreed with the president of Solar Age that, in exchange for the transfer of 200,000 shares of Solar Age to High Tech, petitioner and his co-

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[6] Although the Second Circuit had previously followed this conventional approach, see *United States* v. *Korfant*, 771 F.2d 660, 662 (1985), in *United States* v. *Calderone*, the court concluded that *Korfant* is "no longer good law" in light of *Grady* v. *Corbin*. See 917 F.2d at 721. But even under *Calderone*'s approach, petitioner's argument fails. In *Calderone* the court held that successive conspiracy prosecutions were barred because, as the court saw it, the second prosecution involved conduct—conspiring to sell heroin to an undercover agent in New York—on which the defendants were tried and acquitted in the prior prosecution on much broader drug trafficking conspiracy charges. Although we think the Second Circuit's analysis is wrong legally and factually, it is clear enough in this case that the first indictment covered entirely different conduct than the second. The first indictment did not mention the Solar Age scheme, but concerned two other companies (LCI and Toxic Waste); moreover, it covered a different time frame. Compare 1989 Indictment, Count 3 ¶ 2 (Solar Age conspiracy is alleged to span the period May 1983 to October 1985) with Pet. App. 4a (securities frauds involved in the first indictment spanned the period December 1982 to October 1984).

horts would prepare and have disseminated a research report recommending the purchase of Solar Age securities, and obtain additional financing for Solar Age by means of a secondary public offering. 1989 Indictment, Count 3 ¶¶ 3-7. The first conspiracy ran from June 1982 to October 1984; the second from May 1983 to October 1985. See note 6, *supra*. Although there was a significant overlap in personnel among the two conspiracies, the membership was not co-extensive; the president of Solar Age was not involved in the first conspiracy and the bribed investment fund personnel were not involved in the second. Further, there was no overlap whatever in overt acts, and no degree of interdependence between the two sets of activities.

The courts below also correctly rejected petitioner's unsupported suggestion that the mention of the Solar Age scheme in the presentence report submitted to the district court in the first prosecution somehow bars the present securities fraud charge. A reference to an offense in a presentence report does not constitute prior jeopardy, nor does its use for sentence enhancement implicate multiple punishment concerns. See *Gryger* v. *Burke*, 334 728, 732 (1948). In any event, as the district court explained, there is "nothing to suggest that [petitioner's] involvement in Solar Age affected his sentence," and "[i]n fact, it did not." Pet. App. 25a n.12. Consequently, any conceivable multiple punishment issue is not presented on this record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1991

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